

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-7100

United States Court of Appeals
FOR THE SECOND CIRCUIT

WILLIAM H. NOLAN, on behalf of himself and
all others similarly situated,

Plaintiff-Appellant,

v.

RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER,
THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N.
SOTTILE, as Administrators and Trustees of the Profit
Sharing Plan for the Employees of Merrill Lynch,
Pierce, Fenner & Smith, Incorporated,

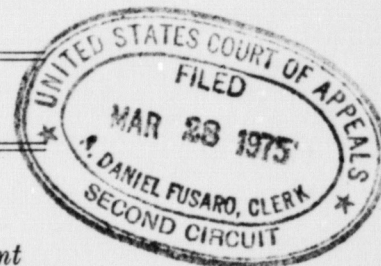
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

MILTON S. ZEIBERG
Attorney for Plaintiff-Appellant
60 East 42nd Street
New York, New York

BROWN, WOOD, FULLER, CALDWELL
& IVEY
Attorneys for Defendants-Appellees
One Liberty Plaza
New York, New York



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1a

JUDGE TYLER
74 CIV. 3701

	PROCEEDINGS	Date Order or Judgment Noted
Aug 28-74	Filed complaint, issued summons.	
Sep 4-74	Filed Summons with Marshall's Returns. Served:	
	Richard B. Meyer -unable to serve-Endeavor on 9/29/74	" " " " "
	Carl Antenucci by Mr. Thomas Smith	" " " " "
	Steve Marker " " " " "	" " " " "
	Thomas White " " " " "	" " " " "
	Leslie C. Kissick-unable to serve-Endeavor " " " " "	" " " " "
Sep 18-74	Filed Deft. Trustees and Administrative Committee's Affidvt & Notice of Motion for an order dismissing action on grounds that complaint fails to state a claim against defts upon which relief can be granted and further that this Court lacks jurisdiction over subject matter in that no federal question is presented and there is no complete diversity of citizenship. ret. 10/4/74, 2:30 p.m., Room 619.	
Sep 18-74	Filed Deft. Trustees and Administrative Committees Memorandum of Law in support of motion to dismiss complaint.	
OCT 2-74	Filed Pltffs Affidvt Notice of Cross-Motion for leave to add Robert S. Markovic as party pltff; for leave to drop Carl Antenucci; to amend complaint ret. 11/1/74.	
OCT 2-74	Filed Pltff's Memorandum in support of cross-motion.	
OCT 2-74	Filed Pltff's Affidvt & Notice of Motion for an order determining action may be maintained as class action ret. 11/8/74.	
OCT 2-74	Filed Pltff's Memorandum in support of Motion pursuant to FRCP Rule 23(c)(1) for an order to determine this action to be maintained as class action.	
OCT 31-74	Filed Stip & Order adjourning motions to dismiss to 11/8/74. Tyler, J.	
Nov 7-74	Filed DEFENDANT'S Memorandum in opposition to branch of defendant's motion to dismiss complaint.	
Nov 7-74	Filed Deft Trustees & Administrators Affidvts in opposition to Pltff's Motion to add/drop parties.	
Nov 7-74	Filed Memorandum in opposition to the Pltff's cross-motion to add/drop parties.	
Nov 11-74	Filed Memo End. on Notice of Cross-Motion dated 10/29/74. Motion withdrawn without prejudice. Tyler, J. (mn)	
JAN 15-75	Filed OPINION/4/17/75. As this Court has no jurisdiction over subject matter of this action, it must be dismissed in its entirety. So Ordered. Tyler, J. (mn)	(mn)
JAN 24-75	Filed JUDGMENT. Ordered that defts Meyer, Antenucci, Marker, White, Kissick, Sottile as Adms & Trustees of Profit Sharing Plan for Employees of Merrill Lynch, Pierce, Fanner & Smith, Inc. have judgment against pltff dismissing complaint in its entirety for lack of jurisdiction over subject matter. Clk. Ent. l/22/75(mn)	
JAN 31-75	Filed Pltff's Notice of Appeal from final Order on 1/16/75 which dismissed complaint (mailed notice to Brown, Wood, Fuller, Caldwell & Ivey, Esqs. 2/3/75)	
JAN 31-75	Filed Pltffs Bond Undertaking for costs on appeal in sum of \$250. (Fidelity and Deposit Co. of Maryland)	
FEB 19-75	FILED PLTFFS Amended Notice of Appeal	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
:
WILLIAM H. NOLAN, on behalf of himself and
all others similarly situated, :

Plaintiff, :

- against - :

RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER,
THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N.
SOTTILE, AS ADMINISTRATORS AND TRUSTEES OF
THE PROFIT SHARING PLAN FOR THE EMPLOYEES OF
MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED, :

Defendants. :

x

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x

Plaintiff, by his attorney, MILTON S. ZEIBERG, on
behalf of himself and all others similarly situated, complaining
of the defendants, respectfully alleges:

JURISDICTION AND VENUE

FIRST: Jurisdiction is founded on diversity of
citizenship and amount and upon the existence of a federal
question based upon the Sherman Anti-Trust Act, 15 U.S.C.A. §1,
et seq.; the Internal Revenue Code of 1954, as amended, Sub-
chapter D - Deferred Compensation, 26 U.S.C.A. §401, et seq.;
the Welfare and Pension Plans Disclosure Act, 29 U.S.C.A. §301,
et seq.; and upon the common law under the principles of pendent
jurisdiction. The amount in controversy exceeds, exclusive of
interest and costs, the sum of Ten Thousand Dollars.

HRT

74 CIV 3701

CLASS
ACTION
COMPLAINT

SECOND: Venue is based in the Southern District of New York, the place where the principal place of business of the defendants is located.

THIRD: Upon information and belief, at all of the times hereinafter mentioned, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED was and still is a corporation duly organized under the laws of the State of Delaware engaged and qualified to conduct a general securities business in the State of New York and in other states of the United States in interstate commerce and succeeded to the business of MERRILL LYNCH, PIERCE, FENNER & BEANE and MERRILL LYNCH, PIERCE, FENNER & SMITH, partnerships. For purposes of brevity, the aforesaid corporation and partnerships are hereinafter collectively referred to as "MERRILL LYNCH."

FOURTH: Upon information and belief the defendants RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER, THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N. SOTTILE were and still are Administrators and Trustees of the PROFIT-SHARING PLAN FOR THE EMPLOYEES OF MERRILL LYNCH ("PLAN"), and were and still are in control of the general administration of the PLAN together with others.

FIFTH: At all of the times hereinafter mentioned, the plaintiff, WILLIAM H. NOLAN was a citizen of the State of

New Jersey. In about 1957, the plaintiff was employed by MERRILL LYNCH as an account executive (registered representative) and was in the continued employment of MERRILL LYNCH for a period of about 11 years until 1968, at which time plaintiff voluntarily resigned from his employment at MERRILL LYNCH and became employed by another New York Stock Exchange firm.

THE PROFIT-SHARING PLAN

SIXTH: In about 1945, MERRILL LYNCH, as employer, adopted a PROFIT-SHARING PLAN FOR THE EMPLOYEES OF MERRILL LYNCH for the exclusive benefit of its employees, and qualified the said PLAN with the Internal Revenue Service pursuant to the provisions of 26 U.S.C.A. §401, et seq.; and, thereafter, as such employer MERRILL LYNCH made regular contributions from its profits to the said PLAN on behalf of the plaintiff and the members of the class hereinafter described.

SEVENTH: From its inception and at the times herein mentioned, the terms, conditions and administration of the PLAN and in particular, its forfeiture provision for future competitive employment by a former employee were subject to the provisions of the Sherman Anti-Trust Act, 15 U.S.C.A. §1, et seq.; the Internal Revenue Code of 1954, as amended, Subchapter D - Deferred Compensation, 26 U.S.C.A. §401 et seq.; the Welfare and Pension Plans Disclosure Act, 29 U.S.C.A. §1 et seq.;

and, the legislative intendments and public policy considerations of each of said acts as well as the common law.

EIGHTH: At the times mentioned herein, the defendants, and each of them, had the legal duty of a fiduciary to the plaintiff and members of the class herein with respect to the administration of the PLAN.

NINTH: At the times mentioned herein, MERRILL LYNCH held out the PLAN as additional compensation to its employees, including plaintiff and members of the class herein, who would exclusively benefit from the payments made by MERRILL LYNCH into the PLAN out of its net profits as additional compensation in consideration of services rendered to MERRILL LYNCH.

TENTH: The said PLAN in pertinent part contained the following provision with respect to forfeiture by a participant of the PLAN of his profit-sharing benefits including plaintiff and members of the class herein, in the event he left the employ of MERRILL LYNCH and joined a competitor:

"Forfeiture of Benefits

"11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits

otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960."

ELEVENTH: Between 1957 and 1968, plaintiff accumulated beneficial interests in the PLAN of about Sixteen Thousand (\$16,000.00) Dollars. In 1968, after about 11 years of employment at MERRILL LYNCH, plaintiff voluntarily left MERRILL LYNCH's employ and was employed by another New York Stock Exchange firm. The defendants herein by reason of such employment declared plaintiff's profit-sharing benefits were forfeit under Article 11.1 of the PLAN. On about October 15, 1968, defendants paid plaintiff the accumulated benefits under the PLAN due up to December 30, 1960 and refused to pay the plaintiff the accumulated benefits due on and after December 30, 1960, and thereby declared said benefits forfeit.

CLASS ACTION ALLEGATIONS

TWELFTH: Plaintiff brings this action in his own behalf and in a representative capacity in behalf of himself and all other former employees of MERRILL LYNCH who acquired beneficial interests in the PLAN during their employment by MERRILL LYNCH and which were declared forfeit and have not been paid by the Administrators and Trustees of the PLAN by reason of the provision of Article 11.1 of the PLAN.

- (a) the members of the class herein consist of all former employees of MERRILL LYNCH whose profit-sharing benefits were declared forfeit and have not been paid for the reason that such employees voluntarily left the employ of MERRILL LYNCH and thereafter engaged in an occupation determined by the Administrators and Trustees to be competitive with MERRILL LYNCH;
- (b) the class members are estimated to be 250 persons or more, their precise number cannot be ascertained at this time, and joinder of all class members is impractical;
- (c) plaintiff will fairly and adequately protect the interests of the class inasmuch as plaintiff is a member of the class and his claim is typical of the claim of all class members;
- (d) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory relief with respect to the class as a whole;
- (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and

(f) the questions of law or fact which are common to the class include:

- (i) whether forfeiture of the profit-sharing benefits for the reason stated in sub-paragraph (a) constitutes an unreasonable restraint of competition in violation of the legislative intent and public policy considerations of the Sherman Anti-Trust Act, 15 U.S.C.A. §1, et seq.; the Internal Revenue Code of 1954, as amended, Subchapter D - Deferred Compensation, 26 U.S.C.A. §401 et seq.; and, the Welfare and Pension Plans Disclosure Act, 29 U.S.C.A. §301 et seq.
- (ii) whether forfeiture for the reason stated in sub-paragraph (a) constitutes an unreasonable restraint against competition under the common law and exceeds the reasonable degree of protection necessary to protect the legitimate interest of the employer.
- (iii) whether forfeiture of the profit-sharing benefits for the reason stated in sub-paragraph (a) enervates free competition in interstate commerce and unreasonably

restrains without consideration the right of an average working man to earn his livelihood or exercise his calling in violation of the legislative intent and public policy considerations of the aforesaid statutes and the common law.

- (iv) whether forfeiture of the profit-sharing benefits for the reason stated in subparagraph (a) under profit-sharing plans qualified under the Internal Revenue Code of 1954, as amended, Subchapter D - Deferred Compensation, 26 U.S.C.A. §401 et seq. are affected by a national public interest and such forfeiture violates the statutory intent that such benefits be for the "exclusive benefit" of employees.
- (v) whether forfeiture of the beneficial interests of the PLAN for the reason stated in sub-paragraph (a) result in an unjust enrichment to others.
- (vi) whether the profit-sharing benefits referred to in the PLAN are additional compensation in consideration of the services rendered.

(vii) whether forfeiture of the profit-sharing benefits for the reason stated in subparagraph (a) constitute an unenforceable penalty under the common law.

(g) The questions of law and fact common to the members of the class predominate over any questions affecting general members.

THE INVALIDITY OF THE FORFEITURE
CLAUSE OF THE PLAN AND DECLARATORY
RELIEF

THIRTEENTH: Plaintiff, in his own behalf, and in behalf of all members of the class similarly situated, respectfully alleges that the forfeiture provision of the PLAN is null, void and unenforceable and violates the legislative intent and public policy considerations of the aforesaid statutes as well as common law, upon the grounds that the said forfeiture provision constitutes an unreasonable restraint upon competition against former employees and exceeds the reasonable degree of protection necessary to protect the legitimate interest of the employer.

FOURTEENTH: Plaintiff, in his own behalf, and in behalf of all members of the class similarly situate respectfully alleges that he and all members of the class whose profit-sharing benefits were declared forfeit for the reason stated in paragraph "TWELFTH" hereof have no adequate remedy at law.

FIFTEENTH: Plaintiff, in his own behalf, and in behalf of all members of the class similarly situated seeks relief declaring that the forfeiture provision of the PLAN is null, void and unenforceable under the aforesaid statutes and the common law.

DAMAGES

SIXTEENTH: Plaintiff has been damaged in the sum of about Sixteen Thousand Dollars (\$16,000.00) by reason of the forfeiture of his beneficial interests in the PLAN earned in the years of his employment by MERRILL LYNCH on and after December 30, 1960. Defendants have refused and still refuse to distribute and pay said beneficial interests to plaintiff, and plaintiff has been damaged thereby in the sum aforesaid, as have all of the members of the class similarly situate in the respective sums of their beneficial interest which were declared forfeit for the reasons stated in Paragraph "TWELFTH" hereof.

WHEREFORE, plaintiff prays this Court for judgment against the defendants as follows:

- (a) Adjudging and decreeing that the forfeiture provision of the PLAN is null, void and unenforceable;
- (b) Adjudging and decreeing that plaintiff and each member of the class whose beneficial

interests were declared forfeit for the reason stated in Paragraph "TWELFTH" hereof be awarded judgment against the defendants in the respective sum or sums of their beneficial interests in the PLAN, with interest from the date of forfeiture;

- (c) Adjudging and decreeing that defendants account to plaintiff and each member of the class;
- (d) Adjudging and decreeing that plaintiff recover a reasonable attorney's fee and his expenses of this litigation, and
- (e) Adjudging and decreeing that plaintiff and the members of the class have such other and further relief as the Court may deem just, together with the costs and disbursements of this action.

Milton S. Zeiberg

MILTON S. ZEIBERG

Attorney for Plaintiff
60 East 42nd Street
New York, New York 10017
(212) OX 7-0722

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

WILLIAM H. NOLAN, being duly sworn, deposes and says that deponent is the plaintiff in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me this

14th day of August, 1974.

Frank J. Melioris
FRANK J. MELIORIS
NOTARY PUBLIC, STATE OF NEW YORK
No. 51-7869900 Qualified in New York County
Commission Expires March 30, 1976

William H. Nolan
WILLIAM H. NOLAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
WILLIAM H. NOLAN, on behalf of :
himself and all other similarly :
situated, :

Plaintiff, :

-against- :

RICHARD B. MEYER, CARL ANTENUCCI, :
STEVE NARKER, THOMAS WHITE, LESLIE :
C. KISSICK and MICHAEL N. SOTTILE, :
AS ADMINISTRATORS AND TRUSTEES OF :
THE PROFIT SHARING PLAN FOR THE :
EMPLOYEES OF MERRILL LYNCH, PIERCE, :
FENNER & SMITH INCORPORATED, :

Defendants. :

74 Civ. 3701 (HRT)

NOTICE OF MOTION TO
DISMISS

-----X
S I R :

PLEASE TAKE NOTICE, that upon the complaint herein,
the annexed affidavits of Messrs. Carl Antenucci, Steven R.
Narker and Thomas J. Mullaney and the exhibits attached
thereto, and upon the memorandum of law submitted herewith,
the undersigned will move this Court at Room 619, United
States Courthouse, Foley Square, New York, New York on the
4th day of October, 1974, at 2:30 p.m. or as soon thereafter
as counsel can be heard for an order dismissing this action
pursuant to F. R. Civ. P. 12(b)(1) and 12(b)(6) on grounds
that the complaint fails to state a claim against defendants
upon which relief can be granted and further that this Court

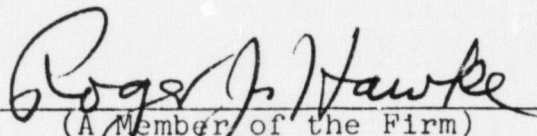
lacks jurisdiction over the subject matter, in that no
federal question is presented and there is no complete
diversity of citizenship and for such other and further
relief as the Court may deem just and proper.

Dated: New York, New York
September 18, 1974

Yours, etc.,

BROWN, WOOD, FULLER, CALDWELL & IVEY

By


(A Member of the Firm)
Attorneys for Defendant Trustees and
Administrative Committee of the
Profit Sharing Plan
One Liberty Plaza
New York, New York 10006
(212) 349-7500

TO:

MILTON S. ZEIBERG, ESQ.
Attorney for Plaintiff
60 East 42nd Street
New York, New York 10017

Affidavit of Carl Antenucci in Support
of Motion.UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

WILLIAM H. NOLAN, on behalf of :
himself and all other similarly :
situated, :

74 Civ. 3701 (HRT)

Plaintiff, :

AFFIDAVIT

-against- :

RICHARD B. MEYER, CARL ANTENUCCI, :
STEVE NARKER, THOMAS WHITE, LESLIE :
C. KISSICK and MICHAEL N. SOTTILE, :
AS ADMINISTRATORS AND TRUSTEES OF :
THE PROFIT SHARING PLAN FOR THE :
EMPLOYEES OF MERRILL LYNCH, PIERCE, :
FENNER & SMITH INCORPORATED, :

Defendants. :

-----X

STATE OF NEW YORK)

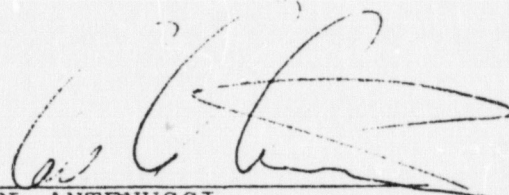
ss.:

COUNTY OF NEW YORK)

CARL ANTENUCCI, being duly sworn, deposes and says:

1. I am one of the defendants in the above-entitled
action.2. I have been informed that one of the bases for
jurisdiction alleged in the complaint in this action is
a purported diversity of citizenship between the plaintiff,
who is a citizen of New Jersey, and the defendants.

3. I wish to inform the Court that I am a citizen of New Jersey, and that I reside at 310 Glenwood Road, Ridgewood, New Jersey 07450.


CARL ANTENUCCI

Sworn to before me this
11th day of September, 1974.

Pauline M. Chiocchi
Notary Public

11 SEP 1974
11 SEP 1974
11 SEP 1974

Affidavit of Steven R. Narker, in
Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
WILLIAM H. NOLAN, on behalf of :
himself and all other similarly :
situated, :

74 Civ. 3701 (HRT)

Plaintiff, :

AFFIDAVIT

-against- :

RICHARD B. MEYER, CARL ANTENUCCI, :
STEVE NARKER, THOMAS WHITE, LESLIE :
C. KISSICK and MICHAEL N. SOTTILE, :
AS ADMINISTRATORS AND TRUSTEES OF :
THE PROFIT SHARING PLAN FOR THE :
EMPLOYEES OF MERRILL LYNCH, PIERCE, :
FENNER & SMITH INCORPORATED, :

Defendants. :


-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK)

ss.:

STEVEN R. NARKER, being duly sworn, deposes and says:

1. I am Secretary to the Trustees and the Administrative Committee of the Deferred Profit Sharing Plan for Employees of Merrill Lynch, Pierce, Fenner & Smith Incorporated and Affiliates ("the Profit Sharing Plan"), and am one of the defendants in the above-captioned action.

2. A copy of the entire Profit Sharing Plan, as amended through May 17, 1966, which was in effect at the time plaintiff resigned in 1968 is annexed hereto as Exhibit A.


STEVEN R. NARKER

Sworn to before me this
day of September, 1974.

Notary Public

THOMAS J. MULLANEY
Notary Public, State of New York
No. 30-8052355
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1978

Affidavit of Thomas J. Mullaney, in
Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

WILLIAM H. NOLAN, on behalf of :
himself and all other similarly :
situated, : 74 Civ. 3701 (HRT)

Plaintiff, : AFFIDAVIT

-against- :

RICHARD B. MEYER, CARL ANTENUCCI, :
STEVE NARKER, THOMAS WHITE, LESLIE :
C. KISSICK and MICHAEL N. SOTTILE, :
AS ADMINISTRATORS AND TRUSTEES OF :
THE PROFIT SHARING PLAN FOR THE :
EMPLOYEES OF MERRILL LYNCH, PIERCE, :
FENNER & SMITH INCORPORATED, :

Defendants. :

-----X

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

THOMAS J. MULLANEY, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and I am associated with the firm of Brown, Wood, Fuller, Caldwell & Ivey, attorneys for the defendants in the above-entitled action. I am fully familiar with the facts and circumstances of this action. I am also fully familiar with a prior action entitled Andrew B. Smith, etc. v. Richard B. Meyer, et al. instituted in the Supreme Court of the State of New York, County of New York, Index No. 7699/73.

2. Smith was commenced by service of a summons and complaint on or about April 25, 1973. A copy of the complaint in that action is annexed hereto as Exhibit B.

3. The substantive allegations of the complaint in Smith were similar to those of the instant action. The representative plaintiff alleged that he had accumulated a beneficial interest in the Profit Sharing Plan for Employees of Merrill Lynch (the "Plan"), that he had left his employment at Merrill Lynch and had become employed with another stock brokerage firm and that the administrators and trustees of the Plan had refused to pay the amount of his beneficial interest to him pursuant to the forfeiture provision of the Plan.

4. Smith was a New York State class action pursuant to CPLR §1005. The class of plaintiffs in that action was described as follows:

"Plaintiff brings this action in his own behalf, and in a representative capacity in behalf of himself and all other former employees of MERRILL LYNCH who acquired beneficial interests in the PLAN during their employment by MERRILL LYNCH which were not paid by the Trustee or the Administrators of the PLAN at the termination of their employment." (Smith v. Meyer Complaint ¶ EIGHTH)

Such a class would include the plaintiff in the instant action. The plaintiff in Smith further alleged that the joinder of all class members was impracticable, that he would fairly and adequately protect the interests of the class, that his claims were typical of the claims of all class members and that there were questions of law and fact common to all members of the class. The plaintiff class in Smith was represented by Milton Zeiberg, Esq., who also represents the plaintiff in this action.

5. The complaint in Smith alleged that the Plan was subject to the Constitutions of the United States and of the State of New York, the Internal Revenue Code and the rules promulgated thereunder, the statutory law of New York, including General Business Law, §340 and Labor Law, §190 et seq. as well as the common law (Smith Complaint, ¶ Fifth). It further alleged that the forfeiture provision of the Plan was in contravention of the common law and of the above-mentioned constitutions and statutes and was therefore void and unenforceable (Smith Complaint, ¶ Eighth). Although the complaint in Smith did not specifically cite the Welfare and Pension Plans Disclosure Act, that Act was relied upon by the plaintiff in his briefs before the Supreme Court (p. 29), the Appellate Division (p. 13) and the Court of Appeals (p. 34).

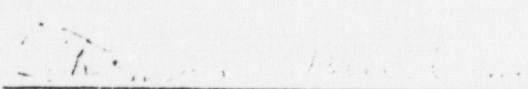
6. Finally, the plaintiff in Smith asked for judgment decreeing that the forfeiture provision of the plan was void and unenforceable, that each member of the class be awarded judgment against the defendants in the amount of his beneficial interest in the plan, that the defendants render an accounting and that the plaintiff recover his expenses and attorneys' fees.

7. On May 30, 1973 the defendant administrators and trustees moved to dismiss the complaint in Smith on the grounds that it failed to state a cause of action. This motion was granted in an opinion by Mr. Justice Martin Evans

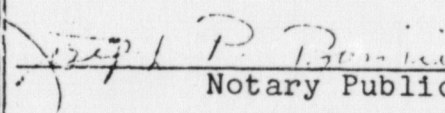
of the Supreme Court, New York County in an opinion reported at Misc.2d , 357 N.Y.S.2d 586 (Sup. Ct. N.Y. Co. 1973).

8. The plaintiff appealed to the Appellate Division of the Supreme Court, First Department. This appeal was argued on April 2, 1974 and the dismissal of the complaint was unanimously affirmed without opinion by the Appellate Division on April 11, 1974. This decision of the Appellate Division is reported at 44 App. Div.2d 778, 355 N.Y.S.2d 314 (1st Dept. 1974).

9. On May 1, 1974 the plaintiff moved for permission to appeal to the Court of Appeals. Defendants opposed the motion on the ground that the law of New York was well settled and that no new issues of substance were raised by plaintiff. Plaintiff's motion was denied by the Court of Appeals on June 6, 1974 (Motion No. 422).


THOMAS J. MULLANEY

Sworn to before me this
day of September, 1974.


Notary Public

JOSEPH P. BONICI
Notary Public, State of New York
No. 43-4506750
Qualified in Richmond County
Certificate Filed in New York County
Commission Exp. March 30, 1975

Exhibit A, Profit Sharing Plan,
Annexed to Foregoing Affidavit.

23

PROVISIONS OF
PROFIT SHARING PLAN
FOR EMPLOYEES (Other than in Canada)
MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED

As amended through May 17, 1966

ARTICLE 1

Administrative Committee

1.1 The Corporation shall appoint a Committee of not less than five (5) nor more than nine (9) members to be known as the Administrative Committee (herein called the "Committee") which shall serve at the pleasure of the Corporation. The members of the Committee may but need not be employees of the Corporation. Vacancies in the Committee arising by resignation, death, removal or otherwise, shall be filled by the Corporation.

1.2 The Committee shall administer the Plan and is authorized to make such rules and regulations as it may deem necessary to carry out the provisions of the Plan. The Committee shall determine any questions arising in the administration, interpretation and application of the Plan, which determination shall be conclusive and binding on all persons.

1.3 The Committee shall have the sole power to control the investment and the reinvestment of the Trust Fund and shall direct the Trustees or such agents or custodians as shall be designated by the Trustees with respect to the exercise or non-exercise of any or all of the powers of investment conferred upon the Trustees by the Trust Agreement.

1.4 The Committee shall appoint a Chairman from among its members and a Secretary who need not be a member. The committee shall act by a majority of its members at the time in office (even though less than five (5) in

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number) and such action may be taken either by a vote at a meeting or in writing without a meeting. The Committee may by such majority action authorize any two or more of its members to execute any document or documents on behalf of the Committee, in which event the Committee shall notify the Trustees in writing of such action and the names of its members so designated and the Trustees thereafter shall accept and rely upon any document executed by such members as representing action by the Committee until the Committee shall file with the Trustees a written revocation of such designation.

1.5 The Committee may appoint such agents, who need not be members of such Committee, as it may deem necessary for the effective performance of its duties and may delegate to such agents such powers and duties as the Committee may deem expedient or appropriate. The compensation, if any, of such agents shall be fixed by the Committee within limits set by the Corporation.

1.6 The acts and determinations of the Committee shall be duly recorded by the Secretary thereof. Such records, together with any documents as may be necessary for the administration of the Plan, shall be preserved in the custody of such Secretary.

1.7 The members of the Committee shall serve without compensation for services as such but all expenses of the Committee shall be paid by the Corporation. Such expenses shall include any expenses incident to the functioning of the Committee, including, but not limited to, fees of investment counsel, compensation of its agents, attorney's fees, accounting charges and other costs of administering the Plan. All disbursements by the Trustees, except for the ordinary expenses of the administration of the Trust, shall be made upon the written instruction of the Committee.

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1.8 The members of the Committee, and each of them, shall be free from all liability, joint or several, for their acts, omissions and conduct, and for the acts, omissions and conduct of their duly constituted agents in the administration of the Plan herein embodied, and the Corporation shall indemnify and save them, and each of them, harmless from the effects and consequences of their acts, omissions and conduct in their official capacity, except to the extent that such effects and consequences shall result from their own willful misconduct.

ARTICLE 2

Contributions

2.1 All contributions under the Plan shall be made by the Corporation and no contributions shall be required or permitted of any employees.

2.2 The contributions of the Corporation under the Plan for each fiscal year of the Corporation shall be determined in the following manner:

(a) the net profits of the Corporation shall be determined for such fiscal year;

(b) the "Contribution Base" for such fiscal year shall be ascertained by applying the following table:

<i>If the Net Profits Are:</i>	<i>The Contribution Shall Be:</i>
Not over \$2,000,000	8% of the Net Profits
Over \$2,000,000	\$160,000 plus 8½% of the excess over \$2,000,000
but not over \$3,000,000	
Over \$3,000,000	\$245,000 plus 9% of the excess over \$3,000,000
but not over \$4,000,000	
Over \$4,000,000	\$335,000 plus 9½% of the excess over \$4,000,000
but not over \$5,000,000	
Over \$5,000,000	\$430,000 plus 10% of the excess over \$5,000,000
but not over \$6,000,000	
Over \$6,000,000	\$530,000 plus 10½% of the excess over \$6,000,000
but not over \$7,000,000	
Over \$7,000,000	\$635,000 plus 11% of the excess over \$7,000,000
but not over \$8,000,000	
Over \$8,000,000	\$745,000 plus 11½% of the excess over \$8,000,000
but not over \$9,000,000	
Over \$9,000,000	\$860,000 plus 12% of the excess over \$9,000,000

(c) a contribution Ratio shall be expressed by a fraction in which the numerator shall be the aggregate of all compensation (as defined in Section 4.5) paid or accrued by the Corporation with respect to such fiscal year to all participants in the Plan who are regularly employed other than in Canada at the end of such fiscal year, and the denominator shall be the total of the compensation paid or accrued by the Corporation with respect to such fiscal year to all such employees of the Corporation and to all employees of the Corporation participating in the Canadian Plan.

(d) the contribution of the Corporation under this Plan for such fiscal year shall be calculated by multiplying the Contribution Ratio determined under subclause (c) hereof by the Contribution Base determined under subclause (b) hereof.

The contribution by the Corporation determined as aforesaid will be paid by the Corporation to the Trustees to be held and administered in trust pursuant to the terms of the Plan and Trust Agreement. In no event, however, shall such contribution for any fiscal year exceed the amount allowable for such fiscal year under Section 404(a) (3) and (7) of the Internal Revenue Code of 1954, as amended, after giving effect to the credit and carry-over provisions of the Code, or under any statute of similar import enacted in lieu thereof.

2.3 As used herein the term "net profits" of the Corporation shall mean its net income or profits determined by the Corporation in accordance with generally accepted accounting principles and practices, adjusted as follows:

(a) No deduction shall be allowed for taxes based on income imposed by the United States.

(b) No deduction shall be allowed for the contributions to this Plan or to the Canadian Plan.

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(c) No deduction shall be allowed for dividends paid on the stock of the Corporation.

(d) A deduction shall be allowed for an amount equal to 6 percent of the aggregate amount of capital. The aggregate amount of capital shall consist of the average outstanding capital stock for the fiscal year, the average paid-in surplus for the fiscal year, and the earned surplus at the beginning of the fiscal year.

(e) A deduction shall be allowed for the full amount of the contributions made to the Pension Plan of the Corporation.

(f) A deduction shall be allowed for an amount equal to dividends received from subsidiaries.

In determining the amount of the contribution to be made for any fiscal year, the Corporation shall be entitled to rely on a computation of Net Profits and of the amounts contributable for such year prepared by independent public accountants on the basis of the Corporation's records prior to the time prescribed by law for filing the federal income tax return for such year, including extensions thereof. The Corporation's determination of such contributions shall be binding on all persons, including the Trustees, the Committee and the participants and their beneficiaries. Such determination shall be final and conclusive and shall not be subject to change as a result of adjustments made in a subsequent audit by the Internal Revenue Service, *provided, however*, that the Corporation may in its discretion take into consideration all or any part of such adjustments in determining the amount of any contributions made in succeeding calendar years.

2.4 As used, the terms "fiscal year" and "year" shall mean the fiscal year of the Corporation as at the time in effect, including a calendar year, a fiscal year other than a calendar year, or a fiscal year of less than twelve (12) months' duration.

ARTICLE 3

Employees Eligible to Participate

3.1 Every employee (except those employees normally employed less than thirty (30) hours per week and those employees paid on a daily or hourly basis), who:

(a) has been continuously employed by the Corporation (or by any other employer whose business, or any part thereof, is absorbed by the Corporation, or by any predecessor of such employer and which is designated by the Corporation as an employer to which this provision shall apply) during an entire fiscal year for which a contribution is being made by the Corporation; and

(b) was employed by the Corporation in the United States at the end of such fiscal year; and

(c) has within thirty (30) days after receiving from the Committee notice of his eligibility, communicated in writing to the Committee his acceptance of participation hereunder upon the terms and conditions of this Plan, shall be eligible to participate in such contribution.

3.2 Such eligible employees shall be determined by the Committee from the Corporation's records and the Committee's determination thereof shall be conclusive and binding upon all persons.

ARTICLE 4

Crediting of Contributions

4.1 As of the end of each fiscal year for which the Corporation shall make a contribution, each employee who is eligible at such time shall be credited by the Committee with the percentage of such contribution (expressed in whole Units of equal value) which his compensation from the Corporation for the fiscal year represents of the total compensation from the Corporation of all eligible employees for such fiscal year.

4.2 For the purpose of crediting the contribution of the fiscal year ended December 31, 1945, the value of each Unit shall be \$1, and for each subsequent fiscal year's contribution, the value of such Unit shall be the amount resulting from the division of the total number of outstanding Units at the end of such fiscal year into the then value of the Trust Fund (excluding the contribution for such fiscal year). In so crediting the eligible employees, the Committee shall disregard fractions of a Unit.

4.3 The "value" of the Trust Fund shall be the fair market value of the net assets held under the Trust (including all profits and increments of any nature whatsoever) determined by the Committee as of the last Friday in December of each year and at such other time or times as to it shall seem advisable, and such determination shall be conclusive and binding upon all persons.

4.4 For the purpose of making distributions the "value" of a Unit shall be its value as determined by the Committee at such time or times as to it seems proper by dividing the total number of outstanding Units at the time of such determination into the most recent or then value of the Trust Fund as determined by the Committee under Section 4.3. Such determination of the value of a Unit shall be conclusive and binding upon all persons.

4.5 The "compensation" of an eligible employee shall be his fixed salary paid by the Corporation during the year for which the contribution is being made plus any cash profit sharing distributions and adjusted compensation paid with respect to such year but shall not include overtime pay, reimbursement for expenses, finder's fees, suggestion awards, deferred profit sharing distributions or similar payments. Notwithstanding the foregoing, the "compensation" of any employee for any fiscal year shall not exceed

a total of \$18,000. The determination by the Corporation of compensation and aggregate compensation of employees shall be conclusive upon all persons.

4.6 Every eligible employee who has been credited with Units hereunder shall be known as a "participant" and as soon as practicable after each such credit, shall be informed in writing by the Committee of the number and value of the Units then standing to his credit.

4.7 Units, the value of which has been distributed to participants, shall be canceled. Units forfeited by participants shall be reallocated as of the end of the fiscal year among continuing participants of the previous year who are then regularly employed by the Corporation in the United States in proportion to their interests in the Trust Fund.

ARTICLE 5

Classification of Units—Vesting

5.1 *With Respect to Units Credited for Fiscal Years up to and Including the Year Ended December 30, 1960:*

(a) Units credited to a participant as of the end of each fiscal year shall be classified as "Deferred Units" and shall become and be reclassified as "Payable Units" as follows, disregarding fractions of a Unit:

- (i) ONE-HALF of the number of Deferred Units standing to the credit of a participant shall become Payable Units as of the March 1 following either:
 - A. The completion by him of ten (10) full fiscal years of employment; or
 - B. The completion by him of five (5) full fiscal years of participation in the Plan,

whichever is later, and thereafter

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- (ii) If the first reclassification of Units on behalf of a participant occurred prior to 1961:
 - A. ONE-SIXTH of the Deferred Units standing to his credit on March 1, 1961 shall become Payable Units on March 1, 1961, and
 - B. ONE-SIXTH of the number of Deferred Units standing to his credit on each succeeding March 1st shall then become Payable Units.
- (iii) If the first reclassification of Units on behalf of a participant occurs in 1961 or later, ONE-SIXTH of the Deferred Units standing to his credit on each March 1st following the reclassification shall then become Payable Units.

5.2 With Respect to Units Credited for Fiscal Years Subsequent to the Year Ended December 30, 1960:

- (a) A participant shall have no vested rights in Units credited after the fiscal year ended December 30, 1960 unless and until he has completed three years of continuous employment. Thereafter, and until completion of five years of continuous employment he shall have a vested right in 30% of such Units allocated to his account. Upon the completion of each succeeding year after 1960 and after five years of continuous employment, such previously credited Units shall vest at the rate of an additional 10% each year up to a maximum of 90%. After completion of five years of continuous employment the new Units credited for each separate year thereafter shall vest at 30% immediately and each succeeding year an additional 10% vesting

shall be added to the Units which were vested at 30%, until the vesting in a year's Units has reached 90%.

- (b) Vested Units shall become and be reclassified as "Payable Units" as follows, disregarding fractions of a Unit:

(i) If the first reclassification of Units on behalf of a participant occurs in 1961 or later:

A. ONE-HALF of the number of Vested Units standing to his credit shall become Payable Vested Units as of the March 1st following either:

- a. The completion by him of ten (10) full fiscal years of employment, or
- b. The completion by him of five (5) full fiscal years of participation in the Plan,

whichever is later, and thereafter

B. ONE-SIXTH of the Non-Payable Vested Units standing to his credit on each succeeding March 1st shall then become Payable Vested Units.

(ii) If the first reclassification of Units on behalf of a participant occurred prior to 1961:

A. ONE-SIXTH of the Vested Units standing to his credit on March 1, 1962 shall become Payable Vested Units, and

B. ONE-SIXTH of the Non-Payable Vested Units standing to his credit on each succeeding March 1st shall then become Payable Vested Units.

- (c) "Employment" shall mean the period of uninterrupted service of the employee after April 1, 1940 as an employee of the Corporation or of any subsidiary or of any other employer whose busi-

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ness, or any part thereof, is heretofore or hereafter absorbed by the Corporation, or of any predecessor of such employer and which is designated by the Corporation as an employer to which this provision shall apply.

ARTICLE 6

Distributions During Employment

6.1 *Units Becoming Payable Units on or before May 1, 1956.*

- (a) Within ninety (90) days of the receipt by the Committee of a request from a participant, the Committee shall direct the Trustees or such custodians or agents as shall be designated by the Trustees to distribute to such participant the then value of such number of Units which became Payable Units on or before May 1, 1956 as the participant shall have requested.

6.2 *Units Becoming Payable Units After May 1, 1956.*

- (a) No Participant shall have the uncontrolled right to withdraw any Units which became or will become Payable Units after May 1, 1956. However, the committee may, at its sole discretion (but with due regard for the requirements of Section 401(a) of the Internal Revenue Code of 1954, as amended) upon request of a participant, permit a withdrawal of such Payable Units when it appears to the Committee, on the basis of the participant's representations or otherwise that he is in need of and intends to use the amount of such Payable Units to acquire, provide or maintain residential property for himself and his family; to defray ordinary living expenses of himself and his family, includ-

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ing costs of education, medical and dental care, taxes and insurance, or for any other purpose which the Committee may determine to be of an emergency character. The Committee shall take action on each such request within ninety (90) days after the receipt thereof; and, if it determines to permit such withdrawal, it shall forthwith direct the Trustees or such custodians or agents as shall be designated by the Trustees to distribute the then value of such Payable Units as the participant shall have requested.

ARTICLE 7

Distributions Upon Severance of Employment

7.1 Upon severance of a participant's employment [other than by reason of death, retirement, or transfer to the employment of any subsidiary of the Corporation or any subsidiary thereof (herein called "Subsidiary")], the Committee shall within six months of such severance, direct the Trustees or such custodians or agents as shall be designated by the Trustees to pay to such participant, in a lump sum or in installments, in cash or in kind, all in the sole discretion of the Committee, the following amounts:

- (a) The value of all Payable Units standing to his credit as of the date of his severance of employment plus, if such severance of employment takes place between the end of any fiscal year and the succeeding March 1, inclusive, the value of the number of Units which would otherwise become Payable Units on such succeeding March 1, and
- (b) The value of the following:
 - (i) *With respect to Units Credited for Fiscal Years up to and Including the Year Ended December 30, 1960:*

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The applicable following percentage of the Deferred Units standing to his credit as of the date of his severance of employment:
50% after completion of the first full fiscal year of employment;

55% after completion of the fifth full fiscal year of employment;

60% after completion of the sixth full fiscal year of employment;

65% after completion of the seventh full fiscal year of employment;

70% after completion of the eighth full fiscal year of employment;

75% after completion of the ninth full fiscal year of employment; and 80% after completion of the tenth full fiscal year of employment and every fiscal year thereafter.

- (ii) *With Respect to Units Credited for Fiscal Years Subsequent to the Year Ended December 30, 1960:*

The Units standing to his credit as of the date of his severance of employment in which his rights have vested.

ARTICLE 8

Distributions Upon Death

8.1 In the event of the death of a Participant, former Participant or retired Participant, the Committee shall direct the Trustees or such custodians or agents as shall be designated by the Trustee to distribute the then value of all Units standing to his credit (whether Payable or Deferred, Vested, or Unvested) to his designated beneficiary or beneficiaries. Each Participant, former Participant, or re-

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tired Participant shall designate in writing on a form prescribed and furnished by the Committee a beneficiary or beneficiaries acceptable to the Committee. In the absence of an effective designation, the Committee is authorized to make payment to a beneficiary or beneficiaries selected by the Committee from among the natural objects of the Participant's bounty, his dependents or his estate. Any determination so made by the Committee shall be binding and conclusive upon all members of the above-described classes and upon the estate of the Participant, former Participant, or retired Participant.

ARTICLE 9

Distributions Upon Retirement

9.1 The normal retirement date of a participant shall be the first day of the month coincident with or next following his 65th birthday.

9.2 A participant may elect to postpone his retirement until the end of the calendar year of his 65th birthday without the consent of the Corporation. Continuation of employment beyond such time shall be only at the request of the Corporation and only on a year to year basis but not beyond the first day of the month coincident with or next following his 70th birthday or January 1, 1962, whichever is later. A participant whose retirement is postponed shall continue to participate in the Plan and shall become fully vested in his normal retirement date in all Units credited to his account then or thereafter.

9.3 A participant may be retired for the purposes hereof prior to attaining his normal retirement date upon becoming totally and permanently disabled or for such other reasons as may be determined by the Corporation to be a basis for retirement.

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9.4 Upon the retirement of a participant, the Committee shall direct the Trustees or such custodians or agents as shall be designated by the Trustees to distribute to such participant the then value of all the Units standing to his credit (whether Payable or Deferred, Vested or Unvested) in a lump sum or installments, in cash or in kind, all in the sole discretion of the Committee.

ARTICLE 10

Transfers to and from Subsidiaries

10.1 In the event that:

- (a) a participant shall terminate employment with the Corporation by reason of transfer to the employment of any subsidiary of the Corporation or any subsidiary thereof (herein called "Subsidiary"), or
- (b) a participant shall be employed by the Corporation in Canada.

The Units then standing to his credit (whether Payable or Deferred, Vested or Unvested) shall remain credited to his account. Upon termination of continuous employment with the Corporation or a Subsidiary, the Units then standing to his credit shall be paid out to him in accordance with the provisions of the Plan pertaining to Death, Retirement and Terminations, whichever is applicable. During such periods of employment with a Subsidiary or with the Corporation in Canada:

1. No contributions shall be made on behalf of any participant but such periods of employment shall be included for the purposes of computing years of employment required for withdrawal privileges and the attainment of vested rights.

2. The Units standing to the participant's account shall share in the profits and losses of the Trust Fund but shall not reflect contributions which are made by the Corporation or forfeitures which occur during any such period.
3. Such Units may be withdrawn by the participant in accordance with the provisions of Article 6.

10.2 A period of uninterrupted employment with a Subsidiary or with the Corporation in Canada, which is immediately followed by employment with the Corporation other than in Canada, shall be included for the purposes of computing years of employment required for eligibility to participate in the Plan, withdrawal privileges and the attainment of vested rights.

ARTICLE 11

Forfeiture of Benefits

11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960.

11.2 In the event that at any time it is determined by the Committee that dishonesty in connection with the business and affairs of the Corporation on the part of a participant occurred during the participant's employment with the

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Corporation or that a participant flagrantly and willfully violated the rules or regulations of any securities or commodities exchange, the National Association of Securities Dealers, the Securities & Exchange Commission, the Commodity Exchange Administration or any other Governmental body having regulatory powers over the Corporation's conduct of business, such participant shall forfeit all rights to any benefits due or to become due to him from the Trust Fund with respect to units credited for fiscal years subsequent to the year ended December 30, 1960. In the event that a participant is guilty of such flagrant, willful negligence in the performance of his duties as to result in the termination of his employment or, in the case of a participant no longer employed, would have resulted in termination of his employment, such participant shall forfeit all rights to any benefits due or to become due to him from the Trust Fund with respect to units credited for fiscal years subsequent to the year ended December 30, 1960. The determination of the Committee shall be subject to review by, and shall require the approval and consent of, the Board of Directors of the Corporation.

ARTICLE 12

Trust Fund

12.1 The Corporation and the Trustees have entered into a Trust Agreement providing for the administration of the Trust Fund. Neither principal nor income of the Trust Fund shall be used for any purpose other than the exclusive benefit of participants or their beneficiaries. The Trust Agreement forms a part of this Plan and any and all rights and benefits which may accrue under this Plan shall be subject to all the terms and provisions of the Trust Agreement.

ARTICLE 13

Uniform Administration

13.1 Whenever, in the administration of the Plan, any action is required by the Corporation or the Committee, including, but not by way of limitation, action with respect to eligibility or classification of employees, contributions or benefits, such action shall be uniform in nature as applied to all persons similarly situated and no such action shall be taken which will discriminate in favor of participants who are officers, shareholders or persons whose principal duties consist of supervising the work of others, or highly compensated participants.

ARTICLE 14

Abandonment of Interest

14.1 It shall be the duty of each participant whose employment has terminated and who is entitled to benefits hereunder to keep the Committee advised of his mailing address. If the Committee shall be unable, within one year after any benefit becomes due from the Trust Fund to a participant, to make payment because the Committee has not been notified of the identity or whereabouts of such person, the Committee may direct that such benefit and all future benefits with respect to such person shall be forfeited and all liability for the payment thereof shall terminate.

ARTICLE 15

Payment Due An Incompetent

15.1 If the Committee determines that any person to whom a payment is due hereunder is incompetent by reason of physical or mental disability, the Committee shall have power to cause the payments becoming due to such person

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to be made to another for the benefit of the incompetent, without responsibility of the Committee or the Trustees to see the application of such payment. Payments made pursuant to such power shall operate as a complete discharge of the Committee, the Trustees and the Trust Fund.

ARTICLE 16

Inalienability of Benefits

16.1 Benefits from the Trust Fund may not be assigned or hypothecated and, to the extent permitted by law, no such benefit shall be subject to legal process or attachment for the payment of any claim against any person entitled to receive it.

ARTICLE 17

Source of Payments

17.1 Benefits payable under the Plan shall be paid or provided solely from the Trust Fund and the Corporation assumes no liability or responsibility therefor. Its obligation is limited solely to making contributions to the Trust Fund as provided in the Plan.

ARTICLE 18

Plan Not a Condition of Employment

18.1 The adoption and maintenance of the Plan shall not be deemed to constitute a contract between the Corporation and any employee or participant, or to be consideration for, or an inducement or condition of, the employment of any person. Nothing herein contained shall be deemed to give any employee or participant the right to be retained in the employ of the Corporation or to interfere with the right of the Corporation to discharge any employee or participant at any time.

ARTICLE 19

Amendment of Plan

19.1 Except as herein provided, the Corporation reserves the right to modify, alter or amend the Plan hereunder at any time and from time to time to any extent that it may deem advisable. Such amendment shall be set out in an instrument in writing duly executed on behalf of the Corporation. No such amendment shall increase the duties or responsibilities of the Trustees without their consent thereto in writing. No such amendment shall have the effect of revesting in the Corporation the whole or any part of the principal or income of the Trust Fund or of diverting any part of such principal or income to purposes other than for the exclusive benefit of the participants or their beneficiaries. No such amendment shall diminish the rights of any participant, whether vested or contingent, subject to the provisions of ARTICLE 11, with respect to contributions made prior to the date of such amendment.

ARTICLE 20

Termination of Plan

20.1 The Plan is purely voluntary on the part of the Corporation and the Corporation reserves the right to terminate the Plan and to discontinue contributions hereunder at any time. If contributions are discontinued, the rights of the then Participants in contributions theretofore made shall fully vest. If the Plan is terminated, the rights of all then Participants shall fully vest. Upon termination of the Trust the Committee shall direct the Trustees to distribute all assets remaining in the Trust Fund, after payment of any expenses properly chargeable against the Trust Fund, to the Participants in accordance with the value of the Units credited to such Participants as of the

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date of such termination, in cash or in kind, and in such manner as the Committee shall in its sole discretion determine. The Committee's determination shall be conclusive upon all persons.

ARTICLE 21

Adoption of Plan by Successor Company

21.1 A successor to the business of the Corporation by whatever form or manner resulting may continue and adopt the Plan by an instrument in writing executed by such successor and by the Corporation. Such successor shall succeed to all the rights, powers and duties hereunder of the Corporation. The employment of any employee who is continued in the employ of such successor shall not be deemed to have been terminated or severed for any purpose hereunder.

ARTICLE 22

Construction of Plan

22.1 The validity of the Plan or of any of the provisions thereof shall be determined under and shall be construed according to the laws of the State of New York.

22.2 Titles to articles and headings are for general information only and the Plan is not to be construed by reference thereto.

22.3 Wherever any words are used in the masculine gender they shall be construed as though they were also used in the feminine gender in all cases where they would so apply, and wherever any words are used in the singular form, they shall be construed as though they were also used in the plural form in all cases where they would so apply.

ARTICLE 23

Preservation of Benefits

23.1 The Corporation intends to preserve the benefits accrued to employees in Canada under this Plan in respect of services performed by them in Canada as fully and to the same extent as if the said employees had remained participants in this Plan. To this end, and as soon as practicable after the effective date of the Canadian Plan and receipt of rulings requested from the Department of National Revenue in Canada and the Treasury Department of the United States with respect to qualification of the Canadian Plan and the maintenance of qualification of this Plan, the Committee shall direct the Trustees of the Trust Fund established under this Plan to transfer and pay to the Trustee under the Canadian Plan an amount equal to the aggregate of the accrued interests of such employees in the Trust Fund as of the date of such payment in respect of services rendered or performed by such employees in Canada. Coincident with such payment, said Committee will cause to be delivered to the Trustee under the Canadian Plan and to the Committee administering the Canadian Plan a statement of the individual interests of all such employees in the said aggregate amount setting forth separately for each employee:

- (a) the interests credited under this Plan for fiscal years up to and including the year ended December 30, 1960;
- (b) the interests credited under this Plan for the fiscal year subsequent to the year ended December 30, 1960;
- (c) the interests which became "payable units" (within the meaning of this Plan).

Exhibit B, Complaint, Smith v. Meyer,
Annexed to Foregoing Affidavit.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x
ANDREW B. SMITH, on behalf of himself
and all others similarly situated,

Plaintiff,

- against -

CLASS ACTION
COMPLAINT

RICHARD B. MEYER, CARL ANTENUCCI, STEVE
NARKER, THOMAS WHITE, LESLIE C. KISSICK
and MICHAEL N. SOTTILE, AS ADMINISTRA-
TORS AND TRUSTEES OF THE PROFIT SHARING
PLAN FOR THE EMPLOYEES OF MERRILL LYNCH,
PIERCE, FENNER & SMITH INCORPORATED and
FIRST NATIONAL CITY BANK, AS CUSTODIAN
OF THE PROFIT SHARING PLAN FOR THE
EMPLOYEES OF MERRILL LYNCH, PIERCE,
FENNER & SMITH INCORPORATED,

Defendants.

-----x
Plaintiff, by his attorney, MILTON S. ZEIBERG,
on behalf of himself, and all others similarly situated,
complaining of defendants, respectfully alleges:

FIRST: Upon information and belief, at all of
the times hereinafter mentioned, MERRILL LYNCH, PIERCE,
FENNER & BEANE and MERRILL LYNCH, PIERCE, FENNER & SMITH
were partnerships engaged in a general securities business
in the City and State of New York, and of which EDWARD A.
PIERCE and others were General Partners. In about 1959,
the said partnerships were succeeded by MERRILL LYNCH,

PIERCE, FENNER & SMITH INCORPORATED, a Delaware corporation. The said partnerships and corporation are collectively hereinafter referred to as "MERRILL LYNCH".

SECOND: In about 1945, MERRILL LYNCH, as employer, adopted a PROFIT SHARING PLAN FOR THE EMPLOYEES OF MERRILL LYNCH (hereinafter "PLAN") for the benefit of its employees, and thereafter, as such employer, made regular contributions to the said PLAN on behalf of the plaintiff and the members of the class hereinafter alleged. The said PLAN was thereafter amended from time to time, and the plaintiff begs leave to refer to the PLAN and such amendments on the trial of this action.

THIRD: Upon information and belief the defendants RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER, THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N. SOTTILE were and still are Administrators and Trustees of the PLAN, and were and still are in control of the general administration of the PLAN together with others.

FOURTH: Upon information and belief, the defendant, FIRST NATIONAL CITY BANK, was and still is a banking corporation, duly organized and existing under the laws of the State of New York, and was and still is the Custodian of the funds of the PLAN and in control thereof as such fiduciary.

FIFTH: At all of the times herein, the terms, conditions and administration of the PLAN were subject to certain provisions of the Internal Revenue Code of the United States and the Rules and Regulations of the Director of the Internal Revenue Service promulgated thereunder as well as the common and statutory law of the State of New York, including its General Business Law §340, its Labor Law §190 et seq., and certain provisions of the Constitution of the United States and of the State of New York.

SIXTH: At all of the times herein, the defendants, and each of them, had the legal duty of a fiduciary to the plaintiff, and members of the class herein with respect to the administration of the PLAN.

SEVENTH: At all of the times mentioned herein, MERRILL LYNCH held out the PLAN as an inducement of additional compensation to its employees after one fiscal year of employment, including the plaintiff and members of the class herein, who would benefit from the portion of its net profits which MERRILL LYNCH would pay into the PLAN as such inducement of additional compensation in consideration of their respective services rendered to MERRILL LYNCH.

EIGHTH: Plaintiff brings this action in his own behalf, and in a representative capacity in behalf of himself and all other former employees of MERRILL LYNCH who acquired beneficial interests in the PLAN during their employment by MERRILL LYNCH which were not paid by the Trustee or the Administrators of the PLAN at the termination of their employment. Plaintiff further respectfully alleges:

(a) The class members are estimated to be 250 persons or more, their precise number cannot be ascertained at this time, and joinder of all class members is impractical.

(b) Plaintiff will fairly and adequately protect the interest of the class inasmuch as plaintiff is a member of the class, and his claims are typical of the claims of all class members. The questions of law and fact which are common to the class include whether the beneficial interests of the members of the class are forfeit if a member of the class leaves the employ of MERRILL LYNCH and thereafter engaged in an occupation competitive with MERRILL LYNCH; whether the forfeiture provision of beneficial interests under the PLAN is in contravention of the intent of the PLAN that such interests

be additional compensation in consideration of services rendered to MERRILL LYNCH; whether the beneficial interests of the plaintiff and members of the class result in an unjust enrichment to other; and, whether said forfeiture provision is in contravention of the common and statutory law to which the PLAN is subject as set forth in paragraph "FIFTH" of this complaint and are otherwise in restraint of trade and against public policy and are thereby void and unenforceable. Plaintiff in his own behalf and in behalf of all members of the class similarly situated, respectfully alleges that the forfeiture provision of the PLAN are in contravention of the common law and statutory law aforesaid, and is thereby void and unenforceable.

(c) The question of law and fact common to the members of the class predominate over any questions affecting general members.

(d) A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

NINTH: In and about August 1957, the plaintiff, ANDREW B. SMITH, was employed by MERRILL LYNCH as an account executive (registered representative) and was in the continued employment of MERRILL LYNCH in the City and

State of New York for a period of about twelve years until about September 1969, at which time said plaintiff resigned from his employment at MERRILL LYNCH and became employed with another stock brokerage firm.

TENTH: Between about August 1957 and September 1969, the plaintiff accumulated beneficial interests in the PLAN of about Sixteen Thousand Eight Hundred Dollars (\$16,800.00), which said beneficial interests had a market value of about Sixteen Thousand Eight Hundred Dollars (\$16,800.00) in about September 1969.

ELEVENTH: Plaintiff has heretofore made demand upon the administrators and trustees of the PLAN for the distribution and payment to him of his beneficial interests in the PLAN which had been earned during the years of his employment by MERRILL LYNCH. Said defendants have refused, and still refuse, to distribute and pay said beneficial interests to plaintiff, and upon information and belief, have instructed the defendant custodian, FIRST NATIONAL CITY BANK, that plaintiff's beneficial interests in the PLAN are forfeit, and plaintiff has been damaged thereby in the sum aforesaid, as have all members of the class similarly situated, in the respective sums of their beneficial interests, with interest.

TWELFTH: Neither plaintiff, nor the members of the class similarly situated, have an adequate remedy at law.

WHEREFORE, plaintiff in his own behalf, and in behalf of all members of the class similarly situated, prays this Court for judgment against the defendants as follows:

(a) Adjudging and decreeing that the forfeiture provision of the PLAN is void and unenforceable;

(b) Adjudging and decreeing that plaintiff and each member of the class be awarded judgment against the defendants in the respective sum or sums of his and their beneficial interests in the PLAN, with interest;

(c) Adjudging and decreeing that the defendants account to plaintiff and each member of the class;

(d) Adjudging and decreeing that plaintiff recover his expenses of this litigation, including a reasonable attorney's fee; and

(e) Adjudging and decreeing that plaintiff and the members of the class have such other and further relief as the Court may deem just, together with the costs and disbursements of this action.

MILTON S. ZEIBERG
Attorney for Plaintiff
125 East 36th Street
New York, N. Y. 10016
(212) OX 7-0722

Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
WILLIAM H. NOLAN, on behalf of himself
and all others similarly situated,

Plaintiff,

-against-

RICHARD B. MEYER, et al.,

Defendants.

-----x

OPINION

74 Civ. 3701 HRT

MILTON S. ZEIBERG, ESQ., New York City,
Attorney for Plaintiff.

BROWN, WOOD, FULLER, CALDWELL & IVEY,
ESQS., New York City, Roger J. Hawke and
Thomas J. Mullaney, Esqs., of counsel,
Attorneys for Defendants.

TYLER, D.J.

Plaintiff commenced this action on August 23, 1974, for a declaratory judgment that the provision of the Employees Profit-Sharing Plan for the Employees of Merrill Lynch, Pierce, Fenner & Smith, Inc. ("the Plan"), which provides for the forfeiture of profit sharing benefits for competitive employment, is void and unenforceable. Plaintiff claims that this provision of the Plan violates the common law and "the legislative intent and public policy considerations" of the Sherman Anti-Trust Act, 15 U.S.C.A. §1 et seq.; Subchapter D of the Internal Revenue Code of 1954; 26 U.S.C.A. §401 et seq.; and the Welfare and Pension Plans Disclosure Act, 29 U.S.C.A.

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§301 et seq. (Complaint, Paragraph 13). Plaintiff also seeks for each member of his class recovery of his profit-sharing benefits which were declared forfeit by defendant administrators and trustees of the Plan pursuant to the relevant forfeiture provision.

The defendants moved on November 8, 1974 to dismiss this action on the grounds that this court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. Rule 12(b)(1) and (6), F.R.Civ.P. As this court finds that it has no jurisdiction over the subject matter, it is unnecessary to reach the issue of sufficiency of the claim.

Federal Question Jurisdiction

Plaintiff has alleged that "the forfeiture clause of the instant plan constitutes a rule-of-reason violation of the Sherman Act." The court may not reach the merits of this Sherman Act claim, however, as it is barred by the statute of limitations. The declaration of forfeiture upon which plaintiff bases his claim is alleged by plaintiff to have occurred on or about October 15, 1968. However, this action was not commenced until August 23, 1974, and the relevant statute of limitations is four years, 15 U.S.C. §15b.¹

¹ Plaintiff's cross-motion to add another party plaintiff, whose claim against the defendants allegedly is not time-barred, was withdrawn by plaintiff without prejudice at oral argument on November 8, 1971.

Plaintiff next asserts that there should be federal question jurisdiction under 28 U.S.C. §2201 because of the "federal nature of profit-sharing benefits and the federal statutory scheme surrounding their creation and administration" (Plaintiff's Memorandum in Opposition, pp. 22-3), specifically portions of the Internal Revenue Code, supra, the Welfare and Pension Plans Disclosure Act, supra, and "general federal public policy." While conceding that neither act provides for a civil remedy, plaintiff urges that the acts show "Congressional interest" in profit-sharing plans, which are "essentially federal in nature and subject to federal jurisdiction." Plaintiff's Memorandum in Opposition, p.25, in Barlow v. Marriott Corporation, 328 F. Supp. 624 (1970), the United States District Court for the District of Maryland dismissed for lack of subject matter jurisdiction an action dealing with a profit-sharing plan's amendments which might have disqualified the plan under §401. That court held that §401(a) did not provide a basis for jurisdiction under 28 U.S.C. §§1331 or 1340, as "[n]on compliance with the Internal Revenue Code is collateral to the resolution of the dispute over those rights." 328 F.Supp. at 628. Section 401 does not prohibit profit-sharing plans which do not qualify under its provisions - the only effect of non-compliance is loss of certain tax deductions - and does not create a right in the employee to the continued qualification of such a plan. Therefore, the court found that under several tests, ²¹no federal question was raised.

²¹

E.g. Gully v. First National Bank of Meridian, 299 U.S. 100, 112-113 (1936); Mishkin, The Federal "Question" in the District Courts, 53 Col.L.Rev. 157,168 (1953); C. Wright Law of Federal Courts 58 (1970 ed.).

"To paraphrase Professor Mishkin, plaintiffs do not have a substantial claim founded directly upon federal law, and, as

Professor Wright suggests, there are present 'pragmatic considerations,' which strongly militate against the acceptance of jurisdiction in this case merely because the contracting parties may have contemplated the availability of certain tax benefits under federal law." I.at 628

This court finds the Barlow holding persuasive.³

Nor does the Welfare and Pension Plans Disclosure Act provide a basis for federal question jurisdiction in this case. The purpose of the Disclosure Act is not to create rights but to protect rights, one granted, by requiring their disclosure. See Sylvania Electric Products, Inc. v. N.L.R.B., 358 F.2d 591,592 (1st Cir. 1966). The general supervision of the administration of such pension plans remains in the state courts, absent diversity jurisdiction. See Lieberman v. Cook, 343 F. Supp. 558, 562 (W.D. Pa. 1972).

Plaintiff's other arguments for federal question jurisdiction are similarly unconvincing. Merrill Lynch's "admission" that state antitrust laws should not apply because of the Plan's interstate nature was not accepted by the United States Supreme Court in Merrill Lynch v. Ware, 414 U.S. 117,140 (1973). The Supreme Court also states "...Merrill Lynch as not demonstrated that national uniformity in the area of wage claims is vital, in some way, to federal securities policy." Id. at 136. The same may certainly be said concerning the federal policy-if there be such - with respect to

³ Parenthetically, it may be noted that profit-sharing plans might equally well be argued to be creations of state law by virtue of such statutory provisions of N.Y. Bus. Corp. Law §202(a)(13), which gives New York corporations the power to establish and administer such profit-sharing plans.

profit-sharing plans. In Bradford v. New York Times, 501 F.2d 51 (2d Cir. 1974), a case much cited by plaintiff, the Court of Appeals for this circuit applied New York State law to evaluate the covenant not to compete in a similar retirement plan. In response to a claim that such a covenant constituted a per se violation of the Sherman Act, the court commented that:

"Although employee restraints have been known to the common law since the 15th century...a state court or, in a diversity case, a federal court applying state law, provide the usual forum for protecting the employee and whatever interest the public may have." 501 F.2d at 60.⁴

It is also well-settled that in providing for declaratory judgment relief pursuant to 28 U.S.C. §2201, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950).

Neither the specific statutes cited by plaintiff nor general federal public policy considerations thus support the extension of federal question jurisdiction to cover profit-sharing plans in general or this Plan in particular.

Diversity Jurisdiction

Mr. Carl Antenucci, one of the defendants in this action, has stated in an affidavit attached to defendants' moving papers that he is a citizen of New Jersey. As plaintiff alleges that he also is

⁴ The court also noted that: "It is very dubious that Bradford's employment with Scripps-Howard had more than a de minimis effect, if any, upon interstate commerce." Id. at 59, n.5

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a New Jersey citizen, there is not the complete diversity necessary to give this court jurisdiction. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch)267 (1806).

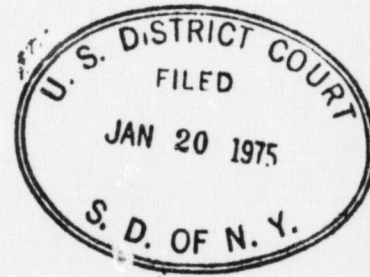
Since this court also lacks federal question jurisdiction, as noted supra, plaintiffs' common law claims cannot be retained in this court on the basis of pendent jurisdiction, see United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966), and Kavit v. A. L. Stamm & Co., 491 F.2d 1176, 1179-80 (2d Cir. 1974).

As this court has no jurisdiction over the subject matter of this action, it must be dismissed in its entirety. It is so ordered.

Dated: January 14, 1975

H. R. TYLER, JR.,
U.S.D.J.

Tyler, J.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
WILLIAM H. NOLAN, on behalf of himself
and all other similarly situated

: 74 Civil 3701 (HRT)

Plaintiff

JUDGMENT

-against-

RICHARD B. MEYER, CARL ANTENUCCI,
STEVE NARKER, THOMAS WHITE, LESLIE C.
KISSICK, MICHAEL N. SOTTILE, as
Administrators and Trustees of the
Profit Sharing Plan for the Employees
of Merrill Lynch, Pierc, Fenner &
Smith Inc.

Defendants

----- X

Defendants having moved the Court to dismiss pursuant to Rule
12(b)(1) and 6, of the Federal Rules of Civil Procedure, and the
said motion having come on to be heard before the Honorable
Harold A. Tyler, United States District Judge, and the Court there-
after on January 16, 1975, having handed down its opinion granting
the said motion, it is,

ORDERED, ADJUDGED and DECREED: That defendants RICHARD B.
MEYER, CARL ANTENUCCI, STEVE NARKER, THOMAS WHITE, LESLIE C. KISSICK,
MICHAEL N. SOTTILE, as Administrators and Trustees of the Profit
Sharing Plan for the Employees of Merrill Lynch, Pierce, Fenner &

Smith Inc., have judgment against plaintiff WILLIAM H. NOLAN, on behalf of himself and all others similarly situated, dismissing the complaint in its entirety for lack of jurisdiction over the subject matter.

Dated: New York, N.Y.
January 20, 1975

Raymond L. Berghardt
Clerk

MICROFILM
JAN 20 1975

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X
:
**WILLIAM H. NOLAN, on behalf of himself and
all others similarly situated,** :

Plaintiff, :

- against - :

**RICHARD B. MEYER, CARL ANTONUCCI, STEVE
HARKER, THOMAS WHITE, LESLIE C. KISSICK
and MICHAEL W. SOTTILE, AS ADMINISTRATORS
AND TRUSTEES OF THE PROFIT SHARING PLAN
FOR THE EMPLOYEES OF MERRILL LYNCH, PIERCE,
FENNER & SMITH, INCORPORATED,** :

Defendants. :

File No.

74 Civ. 3701

**NOTICE
OF
APPEAL**

----- X
SIRS:

**PLEASE TAKE NOTICE that the plaintiff above-named,
hereby appeals to the United States Court of Appeals for the
Second Circuit from a final Order entered in this action on
January 16, 1975 which dismissed the complaint pursuant to**

**F.R. Civ. P. Rule 12(b)(1), and from each and every part of
said order.**

**Dated: New York, New York
January 30th, 1975**

**MILTON S. ZEIBERG
Attorney for Plaintiff
60 East 42nd Street
New York, N.Y. 10017
Tel: (212) CK 7-0722**

**TO: BROWN, WOOD, FULLER, CALDWELL
& IVEY, ESQS.
Attorneys for Defendants
One Liberty Plaza
New York, New York 10006
Tel: (212) 349-7500**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HRT

WILLIAM H. NOLAN, on behalf of himself and
all others similarly situated

Plaintiff,

-against-

RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER
THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N.
SOTTILE, AS ADMINISTRATORS AND TRUSTEES OF THE
PROFIT SHARING PLAN FOR THE EMPLOYEES OF
MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED,

Defendants.

AMENDED NOTICE OF
APPEAL TO THE
SECOND CIRCUIT
COURT OF APPEALS

74 CIVIL 3701

SIRS:

PLEASE TAKE NOTICE that plaintiff above-named, hereby appeals
to the United States Court of Appeals for the Second Circuit from
a final Order entered in this action on January 16, 1975, and the
Judgment entered in this action on January 20, 1975 which dis-
missed the complaint pursuant to F.R.Civ.Pr. Rule 12(b)(1), and
from each and every part of said Order.

Dated: New York, New York
February 19, 1975.

MILTON S. ZEIBERG
Attorney for Plaintiff
60 East 42nd Street
New York, N.Y. 10017
Tel: (212) OX 7-0722

To:

CLERK, UNITED STATES COURT
OF APPEALS

BROWN, WOOD, FULLER, CALDWELL & IVEY ESQS.
ATTORNEYS FOR DEFENDANTS



United States Court of Appeals
for the Second Circuit

75-7100

William H. Nolan, on behalf of himself and
all Others similarly situated,
Plaintiff- Appellant,

v.

Bernard B. Meyer, Carl Antenucci, Steve Narker et al.,
Defendants-Appellees.

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 596 Riverside Drive, New York, New York
That on March 28, 1975, he served 2 copies of
Brief and Appendix
on
Brown, Wood, Fuller, Caldwell & Ivey, Esqs.,
Attorneys for Defendants-Appellees,
One Liberty Plaza,
New York, New York

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

Sworn to before me this 28
day of March, 1975

Juan A. Delgado

John V. [Signature]
JOHN V. [Signature]
Notary Public, State of New York
Qualified in [Signature] County
Commission Expires March 30, 1975

